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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

[Docket ID FEMA-2016-0003]

RIN 1660-AA84

Establishing a Deductible for FEMA's Public Assistance Program

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Emergency Management Agency (FEMA) is considering the establishment of a disaster deductible, requiring a predetermined level of financial or other commitment from a Recipient (Grantee), generally the State, Tribal, or Territorial government, before FEMA will provide assistance under the Public Assistance Program when authorized by a Presidential major disaster declaration. FEMA believes the deductible model would incentivize Recipients to make meaningful improvements in disaster planning, fiscal capacity for disaster response and recovery, and risk mitigation, while contributing to more effective stewardship of taxpayer dollars. For example, Recipients could potentially receive credit toward their deductible requirement through proactive pre-event actions such as adopting enhanced building codes, establishing and maintaining a disaster relief fund or self-insurance plan, or adoption of other measures that reduce the Recipient's risk from disaster events. The deductible model would increase stakeholder investment and participation in disaster recovery and building for future risk, thereby strengthening our nation's resilience to disaster events and reducing

the cost of disasters long term. FEMA seeks comment on all aspects of the deductible concept.

DATES: Comments must be received by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments must be identified by docket ID FEMA-2016-0003 and may be submitted by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail/Hand Delivery/Courier: Regulatory Affairs Division, Office of Chief Counsel, Federal Emergency Management Agency, 8NE, 500 C Street, SW., Washington, DC 20472-3100.

FOR FURTHER INFORMATION CONTACT: Jotham Allen, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, 202-646-1957.

SUPPLEMENTARY INFORMATION

I. Public Participation

Instructions: All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice, which can be viewed by clicking on the “Privacy Notice” link in the footer of www.regulations.gov.

You may submit your comments and material by the methods specified in the ADDRESSES section of this Notice. Please submit your comments and any supporting material by only one means to avoid the receipt and review of duplicate submissions.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov> and search for the docket ID. Submitted comments may also be inspected at FEMA, Office of Chief Counsel, 8NE, 500 C Street, SW., Washington, DC 20472.

II. Background

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5121-5207, provides an orderly and continuing means of assistance by the Federal Government to State, Tribal, Territorial, and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters. 42 U.S.C. 5121(b). A “major disaster,” as defined by the Stafford Act, is “any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance...to supplement the efforts and available resources of [State, Tribal, Territorial, and local governments], and disaster relief organizations, in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. 5122(2).

The declaration process is governed by Federal Emergency Management Agency (FEMA) regulations at 44 CFR part 206, subpart B. Upon receipt of a declaration

request, FEMA formulates a recommendation which is forwarded to the President along with the request. 44 CFR 206.37(c). In developing its recommendation, FEMA considers such factors as the amount and type of damages, the impact of damages on affected individuals, the State, Tribal, Territorial, and local governments, the available resources of the State, Tribal, Territorial, and local governments, and other disaster relief organizations, the extent and type of insurance in effect to cover losses, assistance available from other Federal programs and other sources, imminent threats to public health and safety, recent disaster history, hazard mitigation measures taken by the State, Tribal, Territorial, or local governments (especially implementation of measures required as a result of previous major disaster declarations), and other factors pertinent to a given incident. 44 CFR 206.37(c)(1).

A disaster declaration specifies the types of assistance that may be awarded under the Stafford Act, such as Public Assistance, Individual Assistance, or Hazard Mitigation assistance. Public Assistance provides assistance for debris removal, emergency protective measures, and permanent restoration of infrastructure to State, Tribal, Territorial, and local governments and certain private nonprofit organizations. 44 CFR part 206, subparts G and H.

When evaluating the need for Public Assistance in a major disaster request FEMA evaluates the following factors: estimated cost of assistance, localized impacts, insurance coverage in force, hazard mitigation, recent multiple disasters, and the availability of other Federal assistance programs. 44 CFR 206.48(a). FEMA evaluates the estimated cost of assistance on a per capita basis using the State population (using the most recent decennial Census population), and has established a per capita indicator of \$1 (adjusted

annually based on the Consumer Price Index for all Urban Consumers, the indicator is \$1.41 for events occurring in Fiscal Year 2015) as a level at which an event might warrant Federal assistance. 44 CFR 206.48(a)(1).

Currently, once Public Assistance is authorized, FEMA documents all projects, including debris removal, emergency protective measures, and repair and replacement of eligible facilities, on Project Worksheets to reimburse the Recipient (formerly known as the Grantee, this is the State, Tribal, or Territorial government that received the disaster declaration) and Subrecipients (formerly known as Subgrantees, these are local and Tribal governments, and certain private nonprofit organizations that apply for and receive funding through the Recipient) for all of their eligible costs at the level of the Federal cost share designated by the President. 44 CFR part 206, subpart G.

This practice of funding all eligible costs is somewhat at odds with the principle underlying the Stafford Act that there is a level of disaster activity which the affected State, Tribal, or Territorial government can handle on its own. For simplicity, consider a State that is subject to the \$1 million minimum threshold. 44 CFR 206.48(a)(1). An event that causes \$999,999 in Public Assistance-eligible damage will most likely not warrant a major disaster declaration and the State and affected Tribal and local governments will need to fund all \$999,999 in disaster costs without any supplemental Federal assistance. However, an incident that causes exactly \$1 million in damage in the same State likely will result in a major disaster declaration. Once declared, FEMA will reimburse \$750,000 under the typical 75% Federal cost share arrangement and the State will only need to fund \$250,000. FEMA is arguably supplanting \$750,000 that the State should be fully capable to handle itself.

III. Deductible

Consistent with the principles of the Stafford Act that assistance from the Federal Government is supplemental in nature and that every recipient of disaster assistance has some measureable capacity to independently respond, FEMA is considering the establishment of a disaster “deductible.” To ensure a Recipient’s participation in recovery from disaster losses, following receipt of a major disaster declaration authorizing the Public Assistance Program, the Recipient(s) would be required to demonstrate it has satisfied a predetermined deductible amount before FEMA would provide assistance through a Project Worksheet for eligible Public Assistance work. FEMA would intend for the calculation of the deductible level for each Recipient to be published periodically and to be representative of Recipient capability. In addition to considering how to calculate a deductible amount, FEMA is considering what means by which a Recipient could demonstrate it has satisfied a deductible requirement, including through completion of FEMA-eligible projects entirely with its own funding, or through other Recipient activities for which FEMA would calculate an appropriate credit against the deductible. FEMA might provide a credit toward the deductible, for example, for a Recipient’s prior adoption of a building code that reduces risk; for adoption of proactive fiscal planning such as establishing a disaster relief fund or a self-insurance fund; or investment in programs of assistance available when there is not a federal declaration.

FEMA anticipates a deductible would be calculated and applied at the Recipient (i.e., State, Tribal, or Territorial level), not Subrecipient, level. However, the deductible would need to be satisfied before any project, at either the Recipient or Subrecipient level, would be eligible for assistance.

FEMA believes that a deductible could result in more effective use of taxpayer resources. It could incentivize proactive fiscal planning by Recipients for disasters, encouraging them to set aside funding specifically reserved for disaster response and recovery. The availability of credits toward the deductible could incentivize increased planning and adoption of specific mitigation activities which will result in risk-informed mitigation strategies on a broad scale. States may be encouraged to develop and fund special programs such as emergency management programs and individual assistance programs, as such plans may be credited toward satisfaction of the deductible. Recipients that adopt standardized and enhanced building codes could be rewarded with a credit toward their deductible amount. The results of these efforts may in turn increase our nation's resiliency to disaster events: increased self-sufficiency on the part of State and local governments and their ability to support their citizens during and after a disaster, and a decrease in the negative effects of a disaster on our citizens.

IV. Public Comment

FEMA welcomes public comment on all aspects of the deductible concept, but would derive particular benefit from commenters addressing one or more of the following questions ("Recipient" in these questions refers to any possible entity that might be a Grantee for Public Assistance, including States, Tribes, and Territories):

1. Calculating the Deductible: How should FEMA calculate the deductible amount for each Recipient to adequately reflect individual Recipient capacity?
 - a. Using the Public Assistance per capita indicator established by 44 CFR 206.48(a)(1)? Why?
 - b. Using population estimates? Why?

- i. If so, should FEMA continue to rely upon the decennial census population calculations, consider population estimates, or consider other population calculation sources and why?
- c. Using the Recipient's fiscal capacity? Why?
 - i. If so, how should FEMA measure fiscal capacity? Which metrics should be used to assess it and why? Please also identify preferred sources for suggested metrics. Potential metrics include, but are not limited to:
 - 1. Actual revenue.
 - 2. Potential revenue.
 - 3. Total Taxable Resources.
 - 4. Gross Domestic Product.
 - 5. Budget surplus/deficit.
 - 6. Economic projections.
 - 7. Bond ratings.
 - 8. Unemployment rate.
 - 9. Other.
- d. Using a measurement of disaster risk? Why?
 - i. If so, how should FEMA measure disaster risk? Which metrics should be used to assess it and why? Potential metrics include, but are not limited to:
 - 1. Past presidential declarations.
 - 2. Past FEMA disaster relief.
 - 3. Insurance industry data.

4. Climatological data, including projected future risk.
 5. Priority placed on mitigation in the State or local budget.
 2. Scope of Deductible: How should FEMA define the applicability of the deductible to ensure it incentivizes meaningful improvements in planning, fiscal capacity, and risk mitigation?
 - a. Should the deductible apply to State governments, Territorial governments, Tribal governments, or all of the above?
 - b. To which of the following types of FEMA Public Assistance should the deductible apply and why?
 - i. Direct Federal Assistance (emergency work performed, or contracted for, by the Federal government at the request of the Recipient).
 - ii. Emergency Work (debris removal and emergency protective measures).
 - iii. Permanent Work (infrastructure repair and replacement).
 - iv. Management Costs.
 - v. Other.
3. Satisfying the Deductible: How should a Recipient be able to satisfy its deductible?
 - a. Should only Recipient actions be allowed to satisfy the deductible, or should Subrecipient actions be considered as well and why?
 - i. If Subrecipient actions should be considered, which of the following Subrecipients should be included and why?
 1. Local governments.

2. Indian Tribal governments.
 3. Private nonprofit organizations.
- b. What of the following types of actions should qualify towards satisfying the deductible and why?
- i. Work that would be eligible for FEMA assistance but for the deductible.
 - ii. Management costs for work that would be eligible for FEMA assistance but for the deductible.
 - iii. Spending on incidents that do not receive a Presidential declaration and supplemental FEMA assistance (for example, emergencies declared by the Governor).
 - iv. For incidents that do receive a Presidential declaration, spending in jurisdictions that were not designated for supplemental FEMA assistance.
 - v. Cost-share requirements for FEMA programs.
 1. If so, which programs and why?
 - vi. Spending on projects beyond the cost-share required amount.
 - vii. Investments in emergency management programs using non-Federal funds.
 - viii. Establishment of a disaster relief fund or “rainy day” fund.
 - ix. Expenditures from a disaster relief fund or “rainy day” fund.
 - x. Establishment of an individual assistance program.
 - xi. Expenditures from an individual assistance program.
 - xii. Planning, preparedness, or mitigation programs supported by non-Federal funding.

- xiii. Adoption of standardized or enhanced building codes.
 - xiv. Proportion of the jurisdiction which is covered by standardized and/or enhanced building codes.
 - xv. Other.
- c. How much of an administrative burden would it be for Recipients to track, and submit for verification, documentation related to each manner of satisfying the deductible?
 - i. How would Recipients track the documentation?
 - ii. How should FEMA verify the information?
- d. How should these actions be counted or credited toward satisfaction the deductible? Why?
 - i. Dollar-for-dollar reductions in the deductible. For example, each dollar spent through a Recipient's own individual assistance program could count as a dollar toward meeting the deductible
 - ii. Percentage credits toward the deductible. For example, a Recipient may receive a credit of X percent of the deductible for establishing its own individual assistance program.
 - iii. Other. If so, please provide details regarding these other actions.
- 4. Incentivizing Change: FEMA believes a deductible could improve the United States' disaster management system and increase disaster resilience nationally by driving Recipient legislative action, budgeting, planning and other measures that further greater resilience. FEMA seeks comment on this, as follows:

- a. Will a deductible requirement incentivize potential future Recipients of disaster assistance to adopt measures that make them more resilient or more capable to respond to future disasters? If so, how?
- b. In which of the following areas should FEMA focus the incentives of a deductible approach in order to achieve those improvements in disaster management and resilience and why?
 - i. Increased fiscal capacity to address disasters at the Recipient level.
 - ii. Better planning by Recipients for the financial costs of disaster.
 - iii. Reduced long-term impact of disasters.
 - iv. Reduced risk of loss from disaster.
 - v. Decreased future disaster costs.
 - vi. Better levels of cooperation among neighboring jurisdictions.
 - vii. Increased State emergency management staffing and funding.
 - viii. Other.
- c. What specific actions should FEMA seek to incentivize and why? Potential actions include:
 - i. Acceptance of greater financial responsibility for disaster costs by non-Federal entities.
 - ii. Increased non-Federal investment in emergency management programs generally.
 - iii. Increased investment in mitigation strategies at Recipient levels.
 - iv. Establishment of Recipient disaster relief funds or “rainy day” funds.

- 1. Increased spending from such funds where they already exist.
 - v. Establishment of Recipient individual assistance programs.
 - 1. Increased spending from such funds where they already exist.
 - vi. Increased level of Recipient financial relief provided for incidents that do not receive a Presidential declaration pursuant to the Stafford Act.
 - vii. Other.
- d. How could a deductible incentivize the actions necessary to achieve improvements in the selected areas and how should FEMA design the deductible to provide that incentive?
- e. Are there alternatives to a deductible that could serve as a better incentive to the selected improvements and actions?
 - i. If so, what are those alternatives?
 - ii. Why would those alternatives be more effective than a deductible?
- 5. Implementation Considerations: How could FEMA design deductible implementation so as to maximize effectiveness of the deductible as an incentive, but also ensure Recipients have sufficient opportunity to adjust to it?
 - a. What specific actions might Recipients take if a deductible were introduced to FEMA's Public Assistance Program? What specific types of actions should we seek to incentivize through the establishment of a deductible?
 - b. How would Recipients meet the deductible?
 - i. Would Recipients seek to pass the costs of the deductible on to Subrecipients? How?

- ii. Would the passing on of costs to Subrecipients be appropriate?
Why or why not?
- iii. Should FEMA seek to prevent Recipients from passing the costs on to Subrecipients? Why?
- iv. If so, what methods could FEMA use to prevent the transfer of responsibility for costs from Recipients to Subrecipients?
- c. Should the deductible be applied on an annual basis or per disaster?
 - i. If annual, how should FEMA define the year? Why?
 - ii. If per disaster, should there be a cap on the number of deductibles, or total deductible amount, that a Recipient should be responsible for in a given year? Why? In what way can FEMA be sensitive to problems caused by recurrent disasters through a deductible policy?
 - iii. If appropriate, how should FEMA set the cumulative annual deductible cap for repetitive disasters?
- d. Should FEMA ever consider waiving all or part of the deductible? Why?
 - i. If so, under what circumstances should FEMA consider waiving all or part of the deductible?
 - ii. If so, how should FEMA determine what portion of the deductible should be waived?
 - iii. How frequently should FEMA consider waiving all or a portion of the deductible? Why?
- e. If FEMA introduced a deductible concept to the Public Assistance Program, what steps would Recipients take to adjust?

- i. How long would it take Recipients, working with relevant stakeholders, to appropriately adjust to the introduction of a deductible?
 - ii. Should FEMA consider a phased implementation approach through which the deductible would be applied over time? Why?
 - iii. If so, over how much time should the deductible concept be phased in and in what way? Why?
6. Estimating Impacts: Implementation of a deductible as a prerequisite for receiving Public Assistance would have an economic impact on future Recipients of disaster assistance.
- a. Do Recipients currently maintain a disaster relief or “rainy day” fund?
 - b. If not, how much would it cost to establish and administer a disaster relief or “rainy day” fund?
 - c. If a Recipient could satisfy its deductible through provision of its own individual assistance program, would Recipients establish or expand existing individual assistance programs?
 - d. What are the costs of establishing and running various individual assistance programs?
 - e. If a Recipient could satisfy its deductible through an increase in planning, preparedness, or mitigation programs, would Recipients increase the level of such activities or programs?
 - f. If a Recipient could satisfy its deductible through adoption of enhanced building codes, would Recipients or Recipient communities adopt such codes?

- g. What are the costs associated with adoption of such building codes?
- h. What are the costs associated with the specific actions Recipients might take if a deductible were introduced to FEMA's disaster relief programs?
- i. What, if any, disproportionate impacts might be borne by small nonprofit entities or small government jurisdictions (populations less than 50,000)?

Authority: 42 U.S.C. 5121 et seq.

Dated: January 13, 2016.

W. Craig Fugate,
Administrator
Federal Emergency Management Agency.
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